No. 11026

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

UNITED STATES OF AMERICA,
*Appellant,*
v.
HOMER G. JOHNSON,
*Appellee.*

# BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND

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## OTHER REFERENCES

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## STATEMENT OF THE CASE

Appellant's statement of the case is chronologically correct and adequate through the statement beginning on Page 2 and ending on Page 3 as follows: "Sometime around June 16th the appellee arrived at the scene of the project and started moving in equipment".

Immediately after arriving on the project Johnson and his superintendent, Hildeburn, together with a Mr. Thomas, who was going to do the trucking, drove to the job together and made their plans for the method of proceeding to complete the contract. They had to first construct a camp to house approximately 50 men and look after getting the lumber for this camp and getting the necessary equipment. (Tr. 85)

Defendant introduced in evidence the original diary kept by Joseph E. Wood, the resident engineer of the defendant on the job, which diary kept a record of the daily events occurring on the project, and this diary will be referred to frequently. From the diary it appears that on June 28th the superintendent, Hildeburn, arrived with a compressor and on June 29th work was started on the quarry. It was decided that the logical method to develop the quarry was to, what is termed by contractors, "Coyote" the quarry. This process consists of digging a tunnel similar to a coyote hole in the base of the quarry and then running cross-cuts loading them with explosives and shooting the quarry. Shortly after the 4th of July plaintiff talked to Hildeburn long distance, who advised him that soft rock was being encountered in the process of tunneling, that in his opinion the quarry was going to be a failure as he had encountered soft rock. (Tr. 86-87) A few days after that Hildeburn called Johnson and stated that Mr.

Wood, the resident engineer had sent for the material engineer of the Bureau of Public Roads in San Francisco and he told Johnson to come down. When Johnson got down, Mr. Steele, the materials engineer, was present and they all discussed the question of the soft rock which had been found in the quarry. Johnson was then told by the engineers that although the material was not what they thought it was or what they would like to have it they would have to make the best of it as they had searched the vicinity for rock quarries and nothing else was available. (Tr. 87) Mr. Wood's diary (defendant's Exhibit No. 20) in connection with this shows:

> July 11th. Mailed note to Potter, rock in quarry turned soft. Looked at other possible quarry sites, one at Bear Creek near Pondosa and at Dixon Flatts.
>
> July 12th. Sent samples of binder and rock to Bureau of Standards.
>
> July 13th. Contractor laid off all other work to do work on coyote hole.
>
> July 14th. Rock looks fairly good though not the best.
>
> July 17th. Don Steele approved quarry if material was mixed.

On July 23rd the contractor shot the quarry and set up his crushing plant and proceeded to attempt to produce the material for the construction of the highway.

The quarry was a typical dragline operation and as the dragline bucket worked down into the material

at the top of the quarry soft rock was encountered and as they went to the right there was soft rock right up to the top of the quarry and they had to abandon the right hand side entirely. (Tr. 90-91) The material was so soft that it mashed as it went through the rolls of the roll crusher and would adhere to the rolls and build up and throw the shafts out of line and several shafts broke during the operation. Each time a roll shaft broke the operation would have to shut down for 3 or 4 days while new rolls were obtained from Portland, San Francisco or Spokane.

The contractor testified (Tr. 92) that he had used this same roll crusher on another job before and that he had rented it out on another job and no shafts had ever broken before, that he had used the equipment on subsequent jobs and had only sold it a short time before the trial, and that at no other time had a roll shaft ever broken.

C. Jackson Eldon, a contractor of long experience in this territory, testified (Tr. 162) that he had never had a crusher roll shaft break. That in order to cake on the rolls dense enough and tough enough to break a shaft that the material would have to be more or less the consistency of hard rubber. That certain clays might do that.

Johnson testified that as they continued to operate the quarry that the inspectors would check the loads of material and that due to the soft material the

loads would be lighter than if the material were solid. They would hold the trucks up or order the material dumped or stop things until they got hold of the Resident Engineer, and there was a lot of delay holding up the trucks. (Tr. 93) That many days they were shut down in the attempt to do something to improve the condition.

Johnson testified that the material in this quarry was so soft that he could take a piece of it, similar to a stick of stove wood, and take his jack knife and practically whittle it.

The job undertaken by the plaintiff consisted in resurfacing a highway some 16 miles in length. The gravel quarry described in the call for bids and specifications was located 0.5 miles right of Station 870 and the rock quarry, which is the one we have been discussing, was located approximately 0.3 miles right of Station 1239. These locations were particularly attractive as one was about four miles from one end of the job and the other about four miles from the other end. Had these quarries both contained material satisfactory for the job there would not have been a haul of more than four miles with any load of material and the average haul would have been just two miles, that, therefore, was an important factor in considering the amount of the contractor's bid that these quarries were specified as available.

Mr. Wood's diary shows the continual difficulty in producing good material:

August 10th. Have had contractor close up rolls but still having trouble getting grading.

August 11th. Grading is closer but still a little under.

August 12th. Broke shaft of rolls.

August 21st. Poor rock, closed plant down at 10:00 p. m.

August 23rd. Contractor moved bucket line north to harder rock in the quarry.

August 27th. Closed plant down about 9:00 a. m. and wasted about 70 tons of rock.

August 28th. Closed plant down 9:30 p. m. due to poor rock.

August 29th. Contractor hauled rock on Pondosa road.

August 31st. Closed plant down at 7:30 p. m. Too much soft for proportion of hard rock. Steele and McCoy were here.

September 1st. Contractor did not place rock on road because not enough hard rock available in quarry.

September 6th. Contractor started up Bay City shovel, prospected around for available rock. Broke shaft in rolls at 9:00 p. m.

September 9th. Plant broke down about noon. Broke shaft in rolls last night. Contractor hauled in rock from new quarry Bear Creek. Sent sample of rock to District Office.

September 11th. Started plant after fixing rolls at 7:00 a. m. Rock from new quarry.

September 13th. Moved into quarry No. 2 at about 9:00 a. m. Rock looks pretty good from new quarry thus far.

Mr. Johnson testified that right after Labor Day he went to San Francisco to see the engineers at the District Office and talked to Mr. Potter at the District Office and discussed with him what could be done to remedy the situation that existed at the quarry. That Potter told him he thought he should abandon the rock quarry and move to the gravel plant, and Johnson told him it would cost a lot more money to haul the material from the gravel plant and that something would have to be done to solve the situation; that Potter then told him that he would be up to the job within a few days. (Tr. 105) That while Johnson was in San Francisco, Mr. Hildeburn had taken the gas shovel and had done some prospecting for another source of material and went up the creek a ways and located some rock which looked a little better and they opened up a quarry at that spot. The material had to be trucked from the second quarry to the crushing plant at the old quarry site. That this made the operation much more costly. (Tr. 107-108) That it was only a short time before the rock in the second quarry also began to turn soft and build up on the rolls and they then abandoned both quarries and moved into the gravel pit near the other end of the job. That at that time they had completed about six or seven of the sixteen miles of the base course material and they had produced no oil rock, and that too was their greatest difficulty. That as the surfacing material was placed on the road they put a prime coat of oil on the surface and they had not been able

to produce any oil rock and they could not put the seal coat on without the oil rock to go on top of the seal coat. (Tr. 109)

Johnson testified that they had completed crushing and placing the base course over the entire project from the gravel pit that fall and finished crushing enough oil rock to completely finish the project but that bad weather interrupted placing the oil rock. (Tr. 110) Johnson then testified that about the 18th or 20th of June of the following year he received notice from the Bureau of Roads to proceed. That for almost a month prior to that time they put a grader in maintaining the road. It was being used for traffic all of this time, that the gutters and ditches, which had been finished and cleaned the fall before, were full of material that had sloughed off during the winter, which they had to clean out a second time without any extra pay. That they had to scarify and rip up the surfacing from one end of the job to the other, work it hard and put the prime coat on again before applying the oil rock to the seal coat, for all of which they received no extra compensation, and the Government failed to extend his time of completion and penalized him for late completion. That had the quarries, specified by the Government to be available, been adequate for the production of proper material for this job he would have been able to have completed this job within the time limited by his contract. (Tr. 111-112)

Harry Hildeburn, the plaintiff's superintendent,

explained to the Court the difficulty in producing oil rock pursuant to the trial Judge's questioning. The following is a quotation of his testimony: (Tr. 150)

> "The Court: Why couldn't you get oil rock out of this quarry?
>
> A. Because this rotten rock would come in and contaminate the good rock, and of course if any of that got into the oil rock it would ruin it.
>
> The Court: Why? How would it ruin it?
>
> A. Well, in other words, we will call this rotten rock a piece of clay, and if you put a piece of clay in your oil rock and it is spread on top of the oil and then your roller comes along and rolls that into the oil, why, your roller would immediately (73) mash this rotten rock; then you would have a space there of an inch or two inches that would be nothing but a clay spot and would immediately fade out under the traffic.
>
> The Court: It has to be uniform and hard?
>
> A. It has to be uniform and good rock. It is the best rock we can produce to qualify as oil rock.
>
> Mr. Langley: But you didn't try to produce any? There was no test ever run on any? Is that correct?
>
> A. Oh, no. No, no. From experience we knew we could not produce it.
>
> Q. You were relying upon your own judgment, then, to some extent, weren't you?
>
> A. No. I testified a while ago I was told we would not be allowed to use that for oil rock.
>
> Mr. Langley: That is all, your Honor."

Mr. C. Jackson Eldon, who is considered as an expert in road construction, after having read the specifications relative to the sources of supply, was asked this question: (Tr. 159)

Q. Mr. Eldon, suppose that it turned out that the quarry located approximately three-tenths of a mile right of State 1239 consisted of an overlaying of a narrow facing of hard rock, we will say, ten to twenty feet, and as you go into the quarry you encounter soft material which will ball up on a roll crusher, would you say, Mr. Eldon, that such a quarry would be a quarry which complied with the specifications that the specifying officer agreed to provide?

A. Let me ask a question. Was it a known fact at the time that that was the nature of the quarry?

Q. We are disregarding that, Mr. Eldon. I am merely asking you, if it developed that the quarry was such as I have described, had soft rock with an overlaying of hard rock, would you say that the specification that rock is available for crushing (83) at that station, would that kind of a quarry in your opinion comply with that specification?

A. I would not consider that to be in accord with the representation made in that preceding paragraph.

Q. Is such a quarry as I have described, Mr. Eldon, in your opinion, a quarry fit for the purposes that I have indicated, for the construction of a road project, and particularly one that requires oil rock surfacing?

A. I would not think so.

Q. In good contracting practice would that be a good rock crushing quarry?

A. I wouldn't think so.

Q. Mr. Eldon, will you explain to the Court if you know why it wouldn't be—first, I will ask you, would it be possible or reasonably possible to produce oil rock from such a quarry?

A. It might be possible but it would be impracticable—impractical. It is possible that some of the rock may have been picked out to produce some oil rock but it is wholly impractical from a contractor's standpoint.

Q. It would be highly expensive then?
A. Well, it would be so expensive it would be prohibitive.
Q. Now will you explain to the Court why that is your opinion."

Mr. Johnson testified that had the quarry which they first opened been an ordinary commercial quarry containing rock satisfactory for the production of the material required by this job, that he could have crushed between 850 and 1100 tons of material a day; that at that rate from the time the crushing operation started he could have completed the entire job in 45 days, allowing only 2 or 3 days additional for moving the plant from the first quarry to the second quarry. This would have permitted him to have completed the entire job by approximately the middle of September. (Tr. 226-227)

The Trial Judge tried the case in two parts; first hearing the testimony relative to the claimed breach of contract, and after having determined that the plaintiff was entitled to damages heard plaintiff's witnesses relative to the damages incurred. Defendant offered no witnesses to rebut any of the items of damages claimed. During the progress of the testimony relative to damages a great number of items of the damages were proved which were not alleged in plaintiff's complaint. Defendant made no objection to this proof and at the close of the evidence, plaintiff's attorney moved for leave to amend the complaint to conform to the proof, however, waiving any judg-

ment in excess of $10,000.00 and limiting the prayer of the amended complaint to the sum of $10,000.00. The court granted leave to so amend and made findings of fact and conclusions of law allowing plaintiff a judgment in the sum of $9,999.99, all within the jurisdiction of the court under the Tucker Act.

Appellee's attorney will, in this brief, attempt to follow and answer the arguments of Appellant's argument upon his Assignments of Error by considering them in the order which Appellant has done in its brief.

## ARGUMENT

### I

Appellant argues in support of his first four Assignments of Error that although the complaint in this cause gave jurisdiction to the Court under the Tucker Act in that the damages claimed did not exceed $10,000.00, that by amending to prove items of damage exceeding $10,000.00 although waiving any claim for damages in excess of $10,000.00, that the court somehow lost jurisdiction of the cause. This proposition is specifically decided against appellant in the three cases cited on Page 12 of its brief, to-wit:

Hill v. United States, 40 Fed. 441.
Hedges v. United States, 42 Fed. (2d) 553.
Hammond-Knowlton v. United States, 121 Fed. (2d) 192.

In the last of these cases the court says:

> "It is also held that, if a plaintiff has a claim against the United States for more than $10,000.00, he may, if he waives the balance when he begins the suit, maintain an action against the United States for that limited amount in the District Court under the Tucker Act. (Citing cases) It would seem to follow from the foregoing that, if in a suit under the Tucker Act, the judgment were for $10,000.00 or less, but the pleadings showed a demand for, say, $12,000.00, the judgment nevertheless would not be such to collateral attack."

This court in the case of Oliver v. United States, 149 Fed. (2d) 727, made an excellent analysis of the purpose of the Tucker Act and of the intention of Congress in enacting that statute, as this Court well said in that decision: "It is clear that it was the amount of the claim not of the suit for an aggregate of claims which Mr. Tucker's committee thought should be protected by the head of the Department in the suit in the Court of Claims in Washington".

It is very difficult for the counsel for the Appellee to see wherein it would be more onerous to require the Department to defend the suit on a claim where the claimant may have been injured in excess of $10,000.00 but is willing to limit the amount of his claim in the suit to $10,000.00 than if the claimant had only been injured in the sum of $10,000.00 and still sought to recover that amount of money. The purpose of the Tucker Act was to relieve claimants who resided in localities remote from the Court of Claims from the

expense and bother of filing suit in the Court of Claims and prosecuting it in that jurisdiction far removed from their place of residence, and if a claimant who has actually been injured by the act of the Government to the extent of $15,000.00 wishes to waive any injury in excess of $10,000.00 to require him to go into the Court of Claims would be to defeat the very purpose impelling Congress to enact this legislation for his relief. It is Appellee's firm contention that it is only in the event that the claimant is seeking to recover from the Government on any one cause of action or suit, a sum in excess of $10,000.00 that the District Court of the United States is deprived of jurisdiction, and certainly it was thoroughly understood at all times during the trial of this case that Appellee was limiting any claimed amount for which the court might give judgment to the sum of $10,000.00 and waiving any portion of his claim in excess of that amount.

II

Appellant's argument on Assignments of Error Five to Nine, inclusive, is all directed to the proposition that the Government and its engineers did not, by Paragraph 2.2 of the specifications, warrant that the material in the quarry located approximately 0.3 mile right of Station 1239 was material which would, when produced, comply with the specifications for the material which the contractor was required to pro-

duce for this job, and that the successful bidder could, by ordinary contracting practices, produce the material so required of him from that quarry. It is very difficult to see the purpose of placing this provision in the specifications which were furnished with the call for bids, unless it was the intention of the Government to advise the contractor that such was the case and that he could, in figuring his bid and estimating his costs, rely upon this fact without further investigation. The Government and it engineers further provide, "unless otherwise specifically approved in writing by the engineer, only material from the above source shall be used for crushing." Would any contractor, figuring this job, for a moment contemplate that he would have to look elsewhere for his material? He is specifically advised that if he does figure the job and use any other source of material in his figures that he is running a hazard of having that material subsequently disapproved by the engineer. These two sources of material made an ideal set-up for the performance of this job. One quarry was located at approximately the center of the east half of the job and the other located at approximate the center of the west half. This cut the average haul of material of spreading on the road to approximately two miles, the longest haul that would have been necessary being four miles.

We agree with appellant's definition of a warranty, in that it is "an engagement or understanding

that a certain fact regarding the subject of the contract is, or shall be, as it is declared or promised to be". (Appellant's brief P. 17) Applying that test to Paragraph 2.2 of the specifications, it is hard to see that it can be construed as anything but a warranty. We disagree with Appellant's construction of the second sentence of that section of the specifications. Appellant states that it was intended by that second paragraph to warn the appellee that he might have to acquire gravel from other sources. This is certainly inverting its actual meaning and the one that would naturally be derived from it. It is a specific warning to bidders that it would be folly for them to search for sources of material for themselves, as they would run the risk of having the material rejected by the appellant's engineers and it most strongly supports Appellee's theory relative to the warranty as it contains a strong inference that the Government engineers have inspected, examined and already approved the material to be obtained from the source designated. It is true there was a general provision in the general specifications providing "bidders must make their own estimates of facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies". This is a general provision in the general specifications of all Government contracts, but by all fair and accepted rules of construction when the Government prepares a specific specification for this particular contract, in which sources

of supply are designated, then to say that by a general provision of this character the Government can relieve itself of liability for a misstatement of fact would reduce the whole situation to an absurdity. Ordinary rules of the construction of this provision in the general specifications would be that by particularly including local conditions and uncertainty of weather, other contingencies are excluded and by the rule of "*ejusdem generis*" other contingencies should be held to relate to those of similar nature to those specifically mentioned.

We are not relying upon fraud or misrepresentation in this case and according to Appellee's theory it is immaterial whether or not the Government engineers took the trouble to core drill the quarry in question or make other investigation for its own account as to the character of the material in the quarry, nor is it necessary for us to prove whether the Government material engineers knew or did not know the character of that quarry. We are relying upon the declaration of the source of the material as a warranty that the material in quality and quantity necessary for the efficient performance of this job could be obtained from either or both of these quarries.

It is a general rule of construction that where one party has prepared a contract any ambiguities present in the contract should be resolved in favor of the other contracting party, and in this connection, it

must be remembered that the call for bids and the specifications must all be construed together in determining the meaning of the contract.

Schwartz v. United States, 89 Court of Claims 82.

The argument that a statement requiring bidders to make their own estimates of the facilities and difficulties attending the execution of the contract relieves the Government from liability for a breach of warranty or misrepresentation, has been many times decided against the Government.

United States v. Spearin, 248 U.S. 132, 39 Supreme Court 59.

Christie v. United States, 237 U.S. 234, 35 Supreme Court 565.

Hollerbach v. United States, 233 U.S. 165, 34 Supreme Court 553.

In the last cited case the Court says:

"A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True, the claimants might have penetrated the 7 feet of soft, slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority.

We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt."

(See also Sheridan Kirk Contracting Co. v. United States, 53 Court of Claims 82.)

## III

Appellant's third proposition is that as a matter of law conceding that the Government did warrant the quality and quantity of the material available in the rock quarry which proved defective, that the contractor has no right of action for this breach of warranty, by virtue of the fact that Article 15 of the contract provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer subject to written appeal by the contractor to the head of the Department.

Before entering into the argument on this question, we wish to call the Court's attention to the wording of Article 15 of this contract, which reads as follows:

"Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions *of fact* arising under this

contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

(the italics are ours)

In the case of Callahan Construction Co. vs. United States, 91 Ct. Cls. 538, the court says:

"The rule is well established by the decided cases that in contracts of this character where, as in Art. 15, above mentioned, relating to disputes, it is provided that the decision of the contracting officer and the head of the department shall be final and conclusive only as to questions of fact, a decision or ruling on a protest or appeal which involves or is based upon an interpretation and construction of a contract and the specifications is a decision on a question of law rather than the determination of a fact and does not preclude the consideration, decision, and determination by the court of the question in controversy, including the facts. *Rust. Eng. Co. vs. U. S.*, 86 Ct. Cls. 461. In *Davis, et al, v. U. S.*, 82 Ct. Cls. 334, This Court held that * * * To the same effect is *Lyons v. U. S.* 30 Ct. Cls. 352, 353, 365, *Collings & v. U. S.*, 34 Ct. Cls. 294; *Albina Marine Iron Works, Inc. v. U. S.* 79 Ct. Cls. 714. In *Rust. Eng. Co. v. U. S., supra,* this Court held under Article 15 of the contract, only decisions as to questions of fact by the contracting officer and the head of the department concerned, if an appeal was taken, were to be final and conclusive upon the parties. No appeal was required from any decision of the contracting officer, except as to questions of fact."

There are numerous other cases decided by both the Ct. Cls. and the Federal Courts which follow in line with the view expressed in the Callahan case. The case of *Plato v. U. S.*, 86 Ct. Cls. 665, presents a rather full discussion of the problem. This case dealt with a contract to construct a postoffice. The plaintiff did not present to the contracting officer for his decision during the progress of the work, at the time of its completion, or afterwards, any of the claims for damages asserted in the suit. The defendant contended, therefore, that the Court was without jurisdiction to consider the plaintiff's claim, and the plaintiff was precluded from recovery. The Court says:

> "* * * The rule of law is well settled that it is competent for parties to a contract like the one here involved, to contract that the decision of the contracting officer, or other officer, of all specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that in the absence of fraud or mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the Courts, and that a contractor who fails to avail himself of his right to submit such questions of fact to the contracting officer for decision will not be granted relief by the courts. The defendant has correctly stated the law on this subject in its brief. However, it has nowhere been held by this court, or the Supreme Court, that claims for damages resulting to a contractor because of delays on the part of the Government are of the character of disputes contemplated in Article 15 of the contract which are to be submitted to and decided by the contracting officer, or his duly authorized representative.

"This court, has recently decided that precise question in *Phoenix Bridge Co. v. U. S.* No. 42084, 85 Ct. Cls. 603. Article 15 of the contract in that case relating to disputes was quite similar to Article 15 of the instant case. The Government in that case contended that as a prerequisite to suit, a claim of damages arising out of delay on the part of the Government had to be presented to the contracting officer for decision. The Court rejected this contention:

" 'Counsel for defendant appear to contend that the Court may not award plaintiff damages for delay caused by the defendant for the reason that plaintiff did not submit its claim for unliquidated damages to the contracting officer. But there was no provision in the contract requiring that this should be done as a condition to plaintiff's right to sue, or as a condition to the exercise of jurisdiction over the claims by the court. Article 15 of the contract related to disputes but makes no reference to the matter of submission of *claims for damages for delays caused by the defendant.* Article 9 of the contract provided that plaintiff should notify the contracting officer of the delays and that such officer should ascertain the facts and extent of the delay but does not provide for the submission of damage claims for such delays. Paragraph 20 of the specifications related to the filing of protests. Article 3 of the contract and Article 5 related to extra work. None of these provisions required plaintiff to submit to the department his claims for the amount of damages for delays. In Clyd v. U. S., 13 Wall. 35, 39, the Court held that to require claimants to first submit their claims to the department was establishing a jurisdictional requirement which Congress alone had the power to establish.'

"This Court has held in cases too numerous for citation here that where a contractor is delayed by the Government in the prosecution of work un-

> der a contract, he is entitled to recover as damages the expense and costs incurred by reason of such delays. The Government is not relieved from liability by merely extending the contractor's time for the completion of the contract."

In the case of *Davis, et al. v. U. S.*, 82 Ct. Cls. 334, the Court used similar language:

> But the disputed question here—whether the plaintiff under the terms of the contract was required to furnish the materials demanded by the contracting officer—was not one of fact. It was a disputed question of law—the proper construction of the contract. * * * * This question was outside of the province of the officer, or the head of the department is being the province of the Court to declare the law of the contract

See also *Smoll v. U. S.*, 91 Ct. Cls. 1; *McCloskey v. U. S.*, 66 Ct. Cls. 105; *Collins & Farwell v. U. S.*, 34 Ct. Cls. 294.

Appellant cites the recent case of United States v. Blair, 321 U.S. 730, 88 Law Edition 1039, as its leading authority for the propositions advanced by it. The language of that contract, which was under consideration and construed by the Court, was very different from the language used in this contract. Article 15 of that contract provides that "all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative subject to written appeal by the contractor within 30 days to the head of the de-

partment concerned". It will thus be seen that the contractor in that case agreed to submit not only questions of fact but any dispute arising under the contract to the decision of the contracting officer. However, the question decided in that case would refer to questions of fact and not of law, the question of fact being whether or not extra work was required of the contractor during its progress, so that case establishes no precedent for the propositions of law herein advanced by the appellant.

In the two Court of Claims cases, Reco Building Corporation v. U. S., 99 Ct. Cls. 445 and in the Silas Mason v. U. S. case (Ct. Cls. No. 44659), from the same Court, the Court was considering and construing a proposition of a contract identical to that in the Blair case decided by the United States Supreme Court, but notwithstanding in the Reco case the Court examines the decisions of the contracting officer and finds that the decisions were in fact correct and proper under the contract. In the Silas Mason case the very quotation set out by Appellant in its brief at page 27 shows the Court there recognized a distinction between Article 15 as incorporated in the contract in that case and Article 15 as written in the contract under consideration here, and impliedly the Court holds that had Article 15 in that case been identical with Article 15 in our case, the resulting decision would have been different. On this phase of the argument we must conclude that under the con-

tract as written in this case, Appellee was not required to submit to any administrative officer for determination the legal question of whether or not the specifications in this case constituted a warranty of adequacy and fitness of the quarry furnished, and the further question of whether or not that warranty had been breached and the District Court of the United States had jurisdiction in the first instance to determine that question.

## IV AND V

Appellee will discuss the last two numbered divisions of the argument in Appellant's brief under one heading as these Assignments of Error all attack the sufficiency of the evidence to sustain the Findings of Fact of the Trial Court. Appellant does not claim that there is no evidence to support these Findings but asks the Court to weigh the evidence and determine that the Trial Court erroneously found that the evidence preponderated in favor of the Appellee. It is a well-settled rule of Appellate procedure that no Circuit Court of Appeals will disturb Findings made by a Trial Judge upon contested facts depending upon the weight of the evidence or the veracity of the witnesses. 54 Am. Jur. 937. Foot note 5 on the page last cited, sets forth a long line of cases so holding and we will not burden the Court in this brief with further citations except to quote a typical case from the foot note:

> "In Deputy v. Du Pont, 308 U.S. 488, 84 L. ed. 416, 60 S. Ct. 363, it was held that where the District Court has decided in interpreting the Federal income tax law that payments claimed to be deductible did not proximately result from, and were not ordinary expenses for the conduct of, the taxpayer's business, it was error for the Circuit Court of Appeals to reverse the judgment on that ground."

The Rules of Civil Procedure promulgated by the Supreme Court carry that well established rule into effect in Rule 52, a portion of that rule reading:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Appellant's Assignment of Error 17 towards which its entire subdivision IV of the argument is directed is an attack on the following Findings of Fact of the Court:

VIII

> "That the failure of the government to furnish to plaintiff adequate and satisfactory quarries at the place designated in the call for bids and specifications resulted in delaying the completion of the project and made it impossible for the plaintiff to complete the project within the time limit provided in the contract and prior to the winter of 1937, and defendant assessed against plaintiff a penalty of liquidated damages in the sum of $1,575.00.

IX

> "That due to the fact that plaintiff could not pro-

> duce satisfactory crusher run material from the said quarry he was unable to complete the surface course material for the full southerly half of the job from the said quarry, and which required him to haul a considerable portion of the surface course material from the gravel pit approximately .5 of a mile right of Station 870 to complete the work that he should have been able to have completed from the rock quarry set-up, causing him extra cost due to the longer haul in the amount of $956.48."

Thus it will be seen upon all of the evidence presented the Trial Court found that the delay which prevented the contractor from completing his work in the fall of 1937 was attributable to the breach of warranty by the Government, and that had the rock quarry been as warranted Appellee would have completed his contract within the time limit set forth in the contract; that he had completely performed the work of processing and shaping the roadway and the gutters in 1937 and was compelled to do the work over without additional compensation in 1938. Appellant conceded that there is evidence in the record supporting the findings but says, on Page 29 of its brief, "There was an equal showing on the Government's part that the Appellee's failure to proceed diligently prevented completion of the work in 1937 and was as great a reason for his losses as the lack of quality gravel". This is manifestly a direct request that this Court weigh the evidence and substitute its Findings for the Findings of the Trial Court, however, we have already quoted extensively from the testimony show-

ing that had the quarry designated in the specifications been as warranted, Appellee could have completed his contract in full within 45 days after commencing crushing operations. The Court must also keep in mind the fact that no evidence was offered by the Government to in any way minimize the amount of damages proved by the Appellee. That it did cost Appellee $2,850.17 to reprocess and reshape the roads, stands undisputed in the record.

The same argument applies to all of the other items of damage allowed by the Court and attacked by Appellant in this appeal. The $956.48, the extra cost of the hauling, is undisputed. The $4,618.34 being the extra cost of producing oil rock which would not have been incurred had Appellee been able to produce any oil rock from the rock quarry, and certainly the $1,575.00 which the Government wrongfully assessed against the Appellee as liquidated damages for late completion is undisputed. The only argument by Appellant on these items is that the Court erroneously found that these damages were incurred due to the fault of the Government in specifying the rock quarry and in constantly insisting that Appellee attempt to operate it to produce the material needed for the contract.

## CONCLUSION

In conclusion Appellee respectfully submits that the testimony in this case reveals the fact that the engineers for the Government made an error when they designated this quarry as being available for the production of the material required by the contract; that stubbornness or pride of opinion made those Government agents persist in insisting that proper material could be produced from that quarry, and that this attempt on the part of the contractor to comply with their directions and requests caused him loss and damage in an amount in excess of the damage awarded to him by the Trial Court and that rather than await the long and costly litigation involved in a suit to recover his entire damages by seeking redress in the Court of Claims, he brought this action in the District Court of his residence waiving any claim in excess of the jurisdiction of the District Court, that the Trial Court properly found that he was so damaged and that fault lay with the Government, that the Findings of Fact are correct and the judgment entered is a proper and just one and should be affirmed by this court.

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